Supreme Court of the United States.

OCTOBER TERM, 1901.

NORTHERN PACIFIC RAILWAY COMPANY,
Appellant,

vs.

J. A. SODERBERG,

ADDITIONAL BRIEF FOR APPELLANT.

In the brief filed by appellee on the merits is some argument on questions of jurisdiction.

I.

It is urged first that the allowance of his entry by the land department is conclusive that the land covered thereby is *mineral land*, and it is pointed out that after the cause was heard in the Circuit

Court a patent was issued upon this entry, which was ordered to be filed and made a part of the record in the cause.

There are several answers to the suggestion.

In the first place it appears by the agreed statement in what manner appellee made his entry—that he filed his application in the district land office, "*and by such application he requested to be permitted to purchase said claims as mineral land, and he then and there undertook and offered to maintain by proof that the said claims were valuable only for the granite and building stone therein and thereon, and were mineral lands of the United States, and subject to location under the laws, rules and regulations pertaining to placer mineral claims*" (Transcript, page 31). It affirmatively appears, therefore, that the land department holds the lands in controversy to be *mineral* lands *because* they are chiefly valuable for granite. The effect of the allowance of the entry and of the issuance of patent must be controlled by the facts appearing of record in the land department, and the foregoing extract from the agreed statement is a recital of such record facts. That the lands are mineral is simply the department's legal conclusion from the facts.

In *Burfenning v. Chicago, etc. Ry. Co.*, 163 U. S., 321, an action was brought by Burfenning upon a patent issued on a homestead entry to recover from the defendant the possession of an island in the Mississippi river which was within the corporate

limits of the city of Minneapolis. It was urged by the defendant that the patent was absolutely void and did not pass the legal title for the reason that public land within the limits of an incorporated city was not subject to homestead entry. It appeared that the city of Minneapolis was incorporated March 8, 1881, and this court examined the record of the land department which was in evidence in the case and ascertained that the right of the patentee was initiated March 17, 1883. The contention of the defendant was sustained. The Court said:

> "This is not a case in which the patent was founded upon actual occupancy for homestead purposes, or in which nothing appearing but the patent itself there might be uncertainty as to the time at which the patentee's rights were initiated—whether before or after the incorporation of the city. It is one where, affirmatively and by the record, it is disclosed that there was no pretence or semblance of claim on the part of the patentee until two years subsequent to the organization of the city, and in that respect differs from *Texas & Pacific Railway v. Smith*, 159 U. S., 66, in which, on account of the absence of all testimony, there was suggested an uncertainty as to the time at which, by way of relation, the patentee's rights took effect. The case, therefore, comes within the general rule announced as to the invalidity of a patent issued in defiance of the expressed will of Congress."

In the second place the suggestion of appellee is without force for the reason that the entry was allowed upon land which had already been disposed of by congress. If we are right upon the main ques-

tion the title passed out of the United States upon definite location of the railroad March 26, 1884, and the land department was without jurisdiction to allow appellee's entry or issue his patent.

In the Burfenning case, *supra*, the Court said further:

> "The case of *Morton v. Nebraska*, 21 Wall., 660, is very closely in point. In that case the plaintiff held a patent for lands in Nebraska which were saline lands, and noted as such on the field books, although the notes thereof had not been transferred to the register's general plats. The preemption act of September 4, 1841, c. 16, 5 Stat. 453, 456, declares that 'no lands on which are situated any known salines or mines shall be liable to entry.' Notwithstanding this prohibition patents were issued for the lands, and it was held that they were absolutely void, the court saying, p. 674: 'It does not strengthen the case of the plaintiffs that they obtained certificates of entry, and that patents were subsequently issued on these certificates. It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale, or appropriated, are void. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law."

Again, it appears that the entry of appellee was made while the land was yet unsurveyed and his receipt was issued by the district land office December 20, 1898 (Transcript, p. 32). The plat of survey of the township was not filed until April 11, 1899 (Transcript p. 32). It follows, therefore,

that, when the land department acted upon appellee's application and allowed his entry, the only question before it was whether the land was valuable for granite and building stone as alleged in the application.

The land not having been surveyed, it was not then identified as an odd section, and the department had no jurisdiction to pass on the question of whether the land was mineral or non-mineral within the exception of the Northern Pacific grant

II.

The second point urged by appellee is that complainant has mistaken its remedy and that it should have filed its bill to hold the patentee trustee of the legal title. Suits to hold a patentee trustee can be maintained only where the patent passes the legal title and is voidable merely and not void. *Johnson v. Towsley*, 13 Wall., 72. The complainant contends that the land in controversy is non-mineral, although valuable for building stone, and if this is so, the title both legal and equitable passed out of the United States by the grant *in praesenti*, the land being in the place or granted limits. The patent is therefore absolutely void. The title to land which the United States has previously sold or granted cannot be affected by a patent issued by the land department, as the officers are without jurisdiction. *Van Wyck v. Knevals*, 106 U. S., 360; *Morton v. Nebraska*, 21 Wall.,

660; *Burfenning v. Chicago etc. Ry. Co.*, 163 U. S. 321.

III.

The third point made is equally without force. Appellee urges that because the railway company failed to respond to his notice published under sections 2325 and 2326 of the Revised Statutes, and commence an action for the determination of adverse claims in some court of competent jurisdiction, the complainant is concluded as to the character of the land.

But the land had not been surveyed when this notice was published, and the railroad company could not then determine that the land described therein would fall within an odd section and so be defined as part of its grant.

And the statute does not contemplate that the *character* of the land is a matter to be litigated in the adverse claim suits there provided for. This proceeding is solely for the purpose of trying in the courts the question of the respective claims of adverse claimants under the mining laws. *Alice Placer Mine*, 4 Land Decisions, 314; see also *Iron Silver Mining Co. v. Campbell*, 135 U. S., 286; *Turner v. Sawyer*, 150 U. S., 578; *Perego v. Dodge*, 163 U. S., 160-8.

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